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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANTHONY J. TUSA, JR., AND VICTOR J. TUSA, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The government's brief in opposition devotes much attention to a one-sided factual recitation, but little to the principal question presented: whether the Court should resolve a persistent inter-circuit conflict over whether an unissued license is the government's "property" under the mail fraud statute. On that issue, the government's perfunctory effort to reconcile the decision below with rulings of other circuits cannot obscure the disagreement

among the circuits — a conflict most recently recognized by the Sixth Circuit in a decision issued after the filing of the petition for certiorari, *United States v. Frost*, No. 95-6004, 1997 WL 563304 (6th Cir. Sept. 12, 1997). This Court should grant certiorari to put to rest the substantial dispute among the courts of appeals over a critically important federal criminal statute.

ARGUMENT

A. The Government's Fact Statement Is Misleading and Irrelevant.

The government devotes much of its opposition to an account of the evidence at trial, including intercepted conversations in which, the government asserts, petitioners Anthony and Victor Tusa expressed a desire to "deal with [the] Marcello family head . . . or with family members," stated that they wanted to have a "'sit down' meeting with the mob members" to discuss "business with the mob," sought approval of their business arrangements from "the Marcello crime family," and were told to "provide the Marcello crime family" with a share of their profits. Opp. 4-5. The actual conversations, of course, contained no such references to "the Marcello crime family" or "the mob." Only with the aid of "translation" by an expert witness were the conversations subject to such interpretations, and the Fifth Circuit itself acknowledged that "the tapes do not rule out the Tusas' contention that they engaged in arms-length, legitimate business negotiations . . . ." Pet. App. 7a.

To be sure, the jury found the Tusas did not disclose to the state some material information about their business dealings with companies the government claimed were dominated by organized crime, but the government substantially overstates the evidence of the Tusas' dealings

with organized crime figures. More importantly, the government's prejudicial factual exposition is *irrelevant* to the questions presented. It is clear, and the government does not dispute, that the Tusas' mail fraud convictions depend on whether, in obtaining video gaming licenses from the state, they sought to deprive the state of "property" under the mail fraud statute. The strength or weakness of the government's evidence has no bearing on that issue.

B. *Carpenter* Does Not Resolve the Issue in the Government's Favor.

When it does finally address the property issue, the government relies primarily on the contention that the Court should deny certiorari because the Fifth Circuit's decision is simply a correct application of *Carpenter v. United States*, 484 U.S. 19 (1987). But citing *Carpenter* does nothing to answer the point that the courts of appeals are in disarray over whether an unissued license in the hands of the government constitutes property under *Carpenter* and its predecessor, *McNally v. United States*, 483 U.S. 350 (1987).

Indeed, *all* the appellate decisions finding that such licenses are not property *postdate Carpenter*. And even those appellate judges who have accepted the government's view of the issue have recognized that *Carpenter* does not definitively resolve it in the government's favor. Thus, in *United States v. Novod*, 923 F.2d 970 (2d Cir. 1991), the panel majority (which agreed with the government's position but was bound by prior Second Circuit precedent to hold that licenses were not property) stated:

> *McNally* and *Carpenter* taken together establish that "property" under the statutes encompasses things, however, intangible, that are currently of value to their owners. But

> the cases say nothing about schemes to defraud a state government into granting a discretionary permit.

Id. at 974. Similarly, the Fifth Circuit in this case acknowledged that "neither *McNally* nor *Carpenter* directly answer[s] the question at issue." Pet. App. 12a. Simply invoking *Carpenter* cannot make the issue go away.

C. The Conflict Is Real.

The conflict among the circuits over whether an unissued license is "property" under the mail fraud statute was underscored most recently by the Sixth Circuit in *United States v. Frost*, No. 95-6004, 1997 WL 563304 (6th Cir. Sept. 12, 1997). There, the Sixth Circuit reiterated its view "that the government does not have a property right in a license which it has not issued yet for the purposes of the mail fraud statute." *Id.* at *20. Acknowledging the disagreement among the circuits, the Sixth Circuit cited the Fifth Circuit's decision in this case with a "but see."

The government itself has previously acknowledged to this Court that there is "disagreement in the courts of appeals as to whether, under McNally, an unissued license is property in the hands of the State." Brief for the United States in Opposition at 9, *Martinez v. United States*, No. 90-5753 (U.S. Nov. 19, 1990). However, in prior cases, the government argued that this conflict would disappear because of the passage of 18 U.S.C. § 1346. *Id.* at 8-9; *see also* Brief for the United States in Opposition at 7-8, *Bucuvalas v. United States*, No. 92-888 (U.S. Feb. 3, 1993). As the Fifth Circuit's decision in this case makes clear, however, the passage of Section 1346 has not resolved the issue in cases, such as this one, where the alleged fraud does not involve corruption of a public official or any other act that

deprives a person of the "right to honest services." *See* Pet. App. 14a, n.1. Accordingly, the government no longer attempts to argue directly that the passage of Section 1346 deprives the issue of continuing importance. [1]

Instead, the government says this case really presents no conflict because, under the Louisiana licensing scheme, the state is entitled to significant fees once a license issues. According to the government, this distinguishes the case from all those in which other courts of appeals have issued contrary holdings on the "license as property" issue.

Not even the Fifth Circuit, however, thought the fee-generating nature of the video poker licenses sufficed to distinguish this case from all others. Rather, the Fifth Circuit recognized that its holding was directly at odds with decisions that relied on what it referred to as the "issued-unissued distinction" — namely, *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989), and *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988). *See* Pet. App. 15a-16a. The Fifth Circuit relied on the revenue-generating nature of the licenses only to distinguish one line of reasoning in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), and *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989), which the court characterized as resting in part on a view that the state's interest in licenses was purely "regulatory."

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[1] The government offers, as a footnoted aside, the observation that most of the decisions on which the petitioners rely arose from schemes executed before the enactment of Section 1346. Opp. at 12, n.8. But given that the Fifth Circuit disclaimed any reliance on Section 1346, and that the government offers no theory as to how Section 1346 could possibly apply to the charges against the petitioners (or to the charges that were the subject of the conflicting decisions), the government's observation is irrelevant.

In fact, the revenue-generating features of the video poker licenses do not distinguish the reasoning of *any* of the decisions holding that unissued licenses are not property of the government for purposes of the mail fraud statute. It is a nearly universal feature of licenses that the government receives money for issuing them. If that made the licenses property, then undoubtedly all of the cases holding licenses not to be property would come out the other way. As the government notes (Opp. at 12), most of those cases have not addressed whether or not the government received a license fee (*but see Toulabi v. United States*, 875 F.2d at 125 (noting requirement of fee)), but that is only because the government's entitlement to license fees was irrelevant under the analysis of those cases.

The reason is simple. Although the government may be entitled to receive fees after it *issues* a license, that does not make an *unissued* license property. Nor does a licensee *deprive* the government of property when it procures a license that entitles the government to fees from the licensee. Far from depriving the government of property, the licensee's actions give the government something it did not have before — an entitlement to fees from the licensee.

The point is illustrated by the Second Circuit's decision in *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991). In that case, the defendants had obtained waste disposal permits through false representations, *and* had schemed to deprive the government of fees associated with waste dumping. Nonetheless, the Second Circuit was careful to emphasize that the licenses themselves were not property. *Id.* at 1193-94. The defendants could, however, be convicted of mail fraud if they schemed to deprive the state of the *fees*, which were "money or property" under the statute. Thus, the Second Circuit held, "fraudulent procurement of a permit or license *in order to deprive the*

issuing authority of money or other pecuniary interests" is cognizable under the mail fraud statute. *Id.* at 1194 (emphasis added). But where (as here) there is no such proof, the mere allegation that the defendants schemed to defraud the state of the *license* does not suffice under the mail fraud statute, notwithstanding that fees associated with the licensed activity generated revenues for the state. *See id.* at 1197. *Paccione*'s analysis refutes the government's position that the fee-generating character of the video poker licenses in this case distinguishes those cases that hold that unissued licenses are not property of the government.

Ultimately, the government cannot convincingly deny that the heart of the Fifth Circuit's decision is its holding that the "right to control" issuance of licenses is "property" under the mail fraud statute (Pet. App. 14a-15a) — a holding squarely in conflict with holdings of the Second, Sixth, Seventh, Eighth and Ninth Circuits, though consistent with rulings of the First and Third Circuits. This case makes clear that this long-festering conflict among the circuits over perhaps the most widely used federal criminal statute will not simply disappear because of the passage of 18 U.S.C. § 1346. Until the Court addresses the issue, prosecutors in the First, Third and Fifth Circuits will remain free to continue their ever-increasing use of the mail fraud statute against state regulatory violations that, in other circuits, are not federal crimes at all. It is time that this Court resolve the issue.

D. The Anonymous Jury Issue Merits Review.

The government's brief in opposition confirms that the Fifth Circuit deferred to the district court's decision to empanel an anonymous jury based only on the presence of one defendant alleged by the government to be a low-level

organized crime member and on a small number of newspaper articles about the case. The government's opposition concedes that there was no evidence that any defendant who went to trial posed any threat to the jurors.

The Fifth Circuit's willingness to countenance an anonymous jury on these facts not only runs counter to the Second Circuit's holding that anonymous juries must be subjected to "close judicial scrutiny" and that a mere allegation of organized crime membership does not suffice to justify an anonymous jury, *see United States v. Vario*, 943 F.2d 236, 239-41 (2d Cir. 1991), but also makes a mockery of the Fifth Circuit's own purported recognition that an anonymous jury "is a 'drastic measure' that should be utilized only in limited circumstances." Pet. App. 22a. As explained in the reply of codefendant Salvatore in No. 97-5469, the government's reliance on the absence of a circuit conflict on the abstract question whether an abuse of discretion standard applies to this issue misses the point that the manner in which the Fifth Circuit exercised its review for abuse of discretion, the result reached by the Fifth Circuit, and the procedures employed in the trial court all depart from prior appellate decisions on the use of anonymous juries. Moreover, the appropriateness of deferential review, given the significant constitutional issues at stake, itself merits consideration by this Court.

In view of the importance of a defendant's interest in a public trial, and the increasing frequency of resort to the device of anonymous juries, the use of anonymous juries is an issue that this Court must one day address. The facts of this case, and the *ex parte* procedures used by the trial court, make this a particularly appropriate case in which to review the limits on use of this "drastic measure." The Court should grant certiorari not only to resolve the conflict among the circuits over whether unissued licenses are property

under the mail fraud statute, but also to address the important issues posed by the use of an anonymous jury in this case.

CONCLUSION

For the foregoing reasons, as well as those previously set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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